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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD ANTHONY LOAIZA et al.,

Defendants and Appellants.

B198074

(Los Angeles County
Superior Ct. No. KA073083)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed, as modified, in part; reversed in part and remanded for resentencing.

Robert Franklin Howell, under appointment by the Court of Appeal, for Defendant and Appellant Loaiza.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant Reyes.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Ronald Anthony Loaiza and Hercules Bernardo Reyes appeal from judgments entered following a jury trial in which they were convicted of first degree murder, attempted murder, assault with a firearm, and possession of a firearm by a felon. They raise numerous contentions, including sufficiency of the evidence, and evidentiary, instructional, and sentencing error. We reverse the gang enhancement findings for insufficiency of evidence and remand for resentencing, but otherwise affirm.

FACTS

Early in the evening of November 1, 2005,¹ Reyes fatally shot Robert Castro, and Loaiza shot Anthony Salas, who survived his wound. The shootings occurred in front of Salas' house in La Puente.

Salas had lived in the house for about three years as of November 1. Salas' cousins Christina and Gilbert Gonzalez had lived in the same house for at least three months before November 1. Castro, who was Christina's boyfriend and Salas' friend, was released from prison on November 1. Castro had only been at the house for about ten minutes when the shooting occurred.

Salas, Castro, Reyes, and Loaiza all knew one another and appeared to be friends. They all belonged to the Puente gang, albeit to different cliques. On November 1, their cliques got along with one another. Loaiza and Castro belonged to the Tinflanes clique, while Reyes belonged to the Ballista Street clique. Salas had been jumped out of the Dial Boulevard clique a few months before the charged offenses. Prior to November 1, Salas considered both defendants to be his friends. He had experienced no problems with

¹ Unless otherwise specified, all date references pertain to 2005.

either defendant and had not heard of any problems between Castro and either of the defendants.

Salas' cousin, Francine Ruiz, sometimes brought Reyes over to Salas' house to visit. Ruiz and Reyes had visited Salas at the house just a week before November 1. Loaiza testified he had also visited with Salas and Christina at the house a week or two before November 1.

Salas testified he and Castro were outside the house, behind the garage, when Reyes and Loaiza arrived on November 1. Everyone shook hands, and Reyes hugged Castro. Reyes asked Castro how he had been, then everyone sat quietly. Reyes hugged Castro again. Salas asked Reyes how he had fit an inflatable "bounce house" into his trunk for a birthday party a few days earlier. Reyes complained that it broke his trunk and said, "Come on, check it out." All four men went out to the street, where Reyes opened his car trunk to show them it would not stay open.

Reyes then said to Castro, "Check out my car." Reyes got into the driver's seat and Castro got into the front passenger seat. Someone turned up the volume on the radio, then Salas heard a gunshot inside the car. He looked through the car window and saw Reyes holding the grip of a handgun and Castro holding its barrel, struggling with Reyes. Salas heard Castro say, "What the fuck?" Salas immediately looked at Loaiza, who was about 18 feet away from him.² Loaiza lifted his sweater, pulled out a revolver, and pointed it at Salas' head. Salas stood still, put his hands in the air, and said, "No." Loaiza aimed a little lower and pulled the trigger. The shot struck Salas a little below his stomach and passed through his body. Salas ran to the back of the house. As he ran, he heard about four more shots from the vicinity of Reyes' car.

² Salas originally testified that Loaiza was eight to ten feet from him. After Salas was asked to select something in the courtroom to gauge the distance, the court estimated the distance as 15 to 18 feet.

Christina Gonzalez testified she was inside the house and heard gunshots, but did not see the shooting. She denied knowing defendants and seeing anyone arrive at the house after she brought Castro home. Gilbert Gonzalez testified he was inside the house when he heard a gunshot and his sister screaming. He did not see anyone arrive after Christina and Castro. Detective Marc Verlich testified that Gilbert admitted he was outside when defendants arrived and told Salas that Reyes was there.

The prosecution theorized the motive for defendants' actions was revenge for the murder of their cousin, Gabriela Santini, on August 8, 2004.³ Detective Steven Kays testified he was involved in the investigation of Santini's murder. Castro was a suspect and was detained and interviewed in connection with that crime. Reyes' mother testified Santini was her niece and defendant Reyes' cousin. Upon learning of Santini's death, Reyes was "hurt," but neither Reyes nor his mother had heard Castro might have been responsible. Loaiza testified Santini was also his first cousin, and they had an extremely close relationship. A few days after Santini's death, Loaiza got an "In Memory of Gabby" tattoo. Loaiza heard Castro may have killed Santini. Before the detectives showed him photographs, Loaiza did not know Santini had been shot in the head multiple times.

Loaiza testified, however, that Castro was also his cousin and his close friend, whom he loved. Castro was the leader of Loaiza's clique and talked Loaiza into joining the gang. Castro was a high-ranking member of the gang. Salas was also his friend.

Loaiza testified that he and Reyes were also related, in that they were both related to Santini's parents. Before November 1, however, Loaiza had not seen Reyes for five or six years.

On the afternoon of November 1, Loaiza, along with his girlfriend, daughter, and brother, were at a house located about four blocks from Salas' house. They planned to go from there to the home of Loaiza's mother in Fullerton. Reyes arrived at that house just

³ The parties stipulated that Santini was murdered in a vehicle on that date.

as Loaiza and his family were about to leave. As Reyes and Loaiza were talking, Christina Gonzalez drove past with Castro in the car. Castro waved and threw a gang sign. Loaiza was unaware Castro was out of prison. Loaiza anticipated that Gonzalez and Castro were headed for Salas' house, where Gonzalez had been living. Loaiza had been to Salas' house many times. At Loaiza's suggestion, he and Reyes got in Reyes' car and drove to Salas' house to greet Castro. Loaiza's girlfriend, daughter, and brother left in Loaiza's car. On cross-examination, Loaiza testified he assumed Reyes would either drive him home to Alhambra or back to the house where they met.

When they arrived at Salas' house, Castro, Salas, and Christina were standing together in the area between the front door and the garage. Loaiza and Reyes joined them. Loaiza hugged Castro and shook Salas' hand. Everyone had a friendly conversation. Salas walked toward the street and everyone walked along with him while talking. Although Loaiza was leery of Castro due to the rumors about his involvement in Santini's death and Castro's "authority in the neighborhood," Loaiza did not keep an eye on Castro before the shot was fired. He did not see Castro get into Reyes' car. Loaiza and Salas were standing no more than three feet apart, talking about Halloween. Loaiza was surprised to hear a gunshot. He wondered where it came from and whether someone was shooting at him, but did not look to see whether Castro was shooting. Loaiza pulled out his revolver, extended his arm, and aimed at Salas' head. Salas raised his hands and took a step toward Loaiza. Loaiza did not see a gun in Salas' possession. Nonetheless, Loaiza lowered his aim and pulled the trigger "about twice" from a distance of no more than three feet. Loaiza denied he intended to shoot Salas, and insisted he was trying to shoot at Salas' feet to scare him to prevent him from "coming forward." Without knowing whether either of his shots struck Salas, Loaiza turned and ran. He discarded his gun in a gutter as he ran, then called his girlfriend to pick him up.

Loaiza denied he and Reyes ever discussed killing Castro. Reyes never said he was going to "take out" Castro. Loaiza also denied he was angry with Castro, planned to

ask Castro about Santini,⁴ ever thought about attempting to kill or injure Salas, or did anything to assist Reyes in shooting Castro. Loaiza was carrying a .38 caliber revolver at the time for self-protection and to protect his family. He explained his family was fearful because no one knew who murdered Santini. Also, he grew accustomed to “carrying a gun as a gang member.” Loaiza did not know whether Reyes was armed.

In a November 4 interrogation, Loaiza said the “word on the street” was that Castro killed Santini or they got caught in crossfire. The police implied Castro killed Santini. Loaiza said, “I wish I could say I did shoot him, but I didn’t shoot him.” At trial, Loaiza explained he said that because the police were showing him gory photographs of Santini and telling him Castro had killed her. At that moment he felt that way, but he did not shoot Castro or “plan to help” Reyes kill him.

Loaiza and Reyes were tried together, with a single jury. The jury convicted each defendant of first degree murder, attempted murder, possession of a firearm by a felon, and assault with a firearm. With respect to each defendant, the jury found the attempted murder was willful, deliberate, and premeditated, and the murder, attempted murder, and assault with a firearm were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members (Pen. Code, § 186.22, subd. (b)(1)).⁵ The jury further found that, in the commission of the attempted murder, Loaiza personally and intentionally fired a gun, causing Salas great bodily injury; personally and intentionally fired a gun; and personally used a gun. (§ 12022.53, subds. (b), (c), and (d).) It found, with respect to Loaiza, that in the commission of the murder, a principal personally and intentionally fired a gun, causing Castro’s death; personally and intentionally fired a gun; and personally used a gun. (§ 12022.53, subds. (b), (c), (d), and (e)(1).) The jury also

⁴ On cross-examination, however, Loaiza admitted that when he told the detectives he went to see Castro on November 1 because he “never got the story,” he was referring to Santini’s murder and meant that one of the reasons he went to see Castro was to ask him about it.

found that in the commission of the assault with a firearm, Loaiza personally used a gun (§ 12022.5, subd. (a)), and personally inflicted great bodily injury on Salas (§ 12022.7, subd. (a)). The jury found that in the commission of the murder, Reyes personally and intentionally fired a gun, causing Castro's death; personally and intentionally fired a gun; and personally used a gun. (§ 12022.53, subds. (b), (c), and (d).) With respect to Reyes, the jury found that in the commission of the attempted murder, a principal personally and intentionally fired a gun, causing Salas great bodily injury; personally and intentionally fired a gun; and personally used a gun. (§ 12022.53, subds. (b), (c), (d), and (e)(1).)

Each defendant waived a jury trial on prior conviction and prior prison sentence allegations. The court found Loaiza had one prior serious or violent felony conviction within the scope of the Three Strikes Law (§§ 667, subds. (b)-(j), 1170.12) and one prior serious felony conviction within the scope of section 667, subdivision (a)(1). The court further found Loaiza served a prior prison term within the scope of section 667.5, subdivision (b). The court found Reyes had two prior serious or violent felony convictions within the scope of the Three Strikes Law and one prior serious felony conviction within the scope of section 667, subdivision (a)(1), and that he served a prior prison term within the scope of section 667.5, subdivision (b).

The trial court sentenced Loaiza to 136 years and 4 months to life in prison. For murder (count 1), the court imposed a second strike term of 50 years to life, plus 25 years to life (§ 12022.53, subds. (d), (e)(1), § 186.22, subd. (b)(5)), plus 5 years (§ 667, subd. (a)(1)), for a total of 80 years to life. For attempted murder (count 2), the court imposed a second strike consecutive term of 30 years to life, plus 25 years to life (§ 12022.53, subd. (d)), for a total of 55 years to life. For possession of a firearm by a felon (count 3), the court sentenced Loaiza to a consecutive 16-month term, also as a second strike. The court stayed, pursuant to section 654, a 23-year, second strike term for assault with a firearm (count 5).

⁵ Unless otherwise noted, all statutory references pertain to the Penal Code.

The trial court sentenced Reyes to 201 years to life. For murder (count 1), the court imposed a third strike term of 75 years to life, plus 25 years to life (§ 12022.53, subd. (d)), plus 5 years (§ 667, subd. (a)(1)), plus 1 year (§ 667.5, subd. (b)), for a total of 106 years to life. For attempted murder (count 2), the court imposed a third strike consecutive term of 45 years to life, plus 25 years to life (§ 12022.53, subds. (d), (e)(1)), for a total of 70 years to life. For possession of a firearm by a felon (count 4), the court imposed a third strike consecutive term of 25 years to life. The court stayed, pursuant to section 654, a 35-year, third strike term for assault with a firearm (count 5).

DISCUSSION

1. Sufficiency of evidence

Defendants contend the evidence was insufficient to support their convictions for murder and attempted murder; the finding the attempted murder was willful, deliberate, and premeditated; and the findings – presumably with respect to counts 1, 2, and 5 – that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the convictions and findings, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) We presume the existence of every fact supporting the judgment the jury could reasonably deduce from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.)

a. Murder

Defendants argue there was insufficient evidence of premeditation and deliberation to support their first degree murder convictions.⁶

Premeditation requires that the act be considered beforehand. Deliberation requires careful thought and weighing of considerations for and against the act. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) The extent of the reflection, not the length of time, is the true test. (*Ibid.*) These processes can occur very rapidly, even after an altercation or transaction is under way. (*Ibid.*; *People v. Sanchez* (1995) 12 Cal.4th 1, 34 (*Sanchez*).)

Three types of evidence that typically support a finding of premeditation and deliberation are planning activity, a prior relationship with the victim or conduct from which a motive could be inferred, and a manner of killing from which a preconceived plan could be inferred. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) However, these categories are not prerequisites, they are simply guidelines to assist reviewing courts in assessing whether the evidence supports an inference that the killing (or attempted killing) resulted from pre-existing reflection and weighing of considerations, rather than an unconsidered or rash impulse. (*Sanchez, supra*, 12 Cal.4th at pp. 32-33.)

The record includes ample circumstantial evidence of planning-type activity by defendants. They went together to Salas' house, and each was armed with a loaded gun. Salas and Loaiza both testified that defendants and the victims had a pleasant, even fond, meeting and conversation. Nothing indicates that Castro, Salas, or anyone else did or said anything to create hostility or provoke a violent attack. Nonetheless, defendants engaged in coordinated conduct, without additional communication between themselves, that ended in two shootings. First, defendants lured Castro away from the house, in which there were several other people, including Christina and Gilbert Gonzalez and at least two of Christina's children. Reyes then isolated Castro and made him more

⁶ Each defendant joins in the applicable arguments of his co-defendant.

vulnerable and harder to observe by inducing him to get into the car. This increased Castro's vulnerability by restricting his freedom of movement, placing him in very close quarters with Reyes, and reducing the ability of those in the house or neighborhood to see or prevent what Reyes was about to do. The jury could also reasonably infer that it was Reyes who turned up the volume on the car stereo just before shooting Castro, and that this was done to attempt to mask the sound of the gunshot. Salas' testimony demonstrates that Loaiza was not surprised when Reyes shot Castro, but immediately drew his own gun and aimed it straight at his friend Salas. Loaiza did not express surprise or confusion or look around to see where the shot came from. He aimed at and shot his friend who was unarmed and had not provoked any violent reaction. The jury could reasonably infer that the shooting was planned by Loaiza and Reyes, and Loaiza was performing his role in the plan.

The manner of the shooting also reflects planning. After Reyes lured Castro into a position of vulnerability, he shot Castro at very close quarters, which created a high likelihood of inflicting a mortal wound.

Finally, the record includes evidence of a strong motive capable of uniting defendants to act against Castro: revenge for Santini's murder. Santini was a cousin to both defendants and both were upset by her murder. Loaiza admitted he was extremely close to Santini and had heard Castro may have been responsible for her murder.

Defendants base their arguments, in part, upon imperfections in their plan and alternative explanations for various points, such as the reason they carried guns. However, the sufficiency of the evidence issue must be resolved by viewing the evidence in the light most, not least, favorable to the judgment.

Loaiza also contends there was insufficient evidence to support his liability as an aider and abettor because he did not commit any act that assisted Reyes in murdering Castro.

A person aids and abets the commission of a crime when he or she, with knowledge of the unlawful purpose of the perpetrator, and with the intent or purpose of

committing, facilitating or encouraging commission of the crime, by act or advice, aids, promotes, encourages or instigates the commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259; *People v. Beeman* (1984) 35 Cal.3d 547, 561.) The same criminal liability attaches whether a defendant directly perpetrates an offense or aids and abets the perpetrator. (Pen. Code, § 31; *People v. Montoya* (1994) 7 Cal.4th 1027, 1038-1039.)

Loaiza carried a concealed and loaded weapon and accompanied Reyes to Salas' house. He moved to the street area with Reyes and the intended victims, and stood near the car, watching Salas, while Reyes shot Castro. Loaiza then immediately aimed his loaded gun at Salas and shot him. Reasonable jurors could infer Loaiza assisted Reyes in the commission of Castro's murder by (1) providing armed back-up to overcome potential resistance by Castro and/or any witness who might attempt to interfere with the plan or defendants' safe escape from the scene, and (2) intimidating or harming witnesses to the crime who might identify defendants and testify against them.

Although Loaiza does not expressly challenge the evidence of his intent, we note the evidence of planning to support a finding of premeditation and deliberation also demonstrates that defendants developed and executed a plan to kill Castro. Loaiza's participation in that plan amply demonstrates his intent to facilitate Castro's murder.

Accordingly, we conclude substantial evidence supports defendants' first degree murder convictions.

b. Attempted murder

Reyes challenges the sufficiency of the evidence to establish his liability as an aider and abettor in the attempted murder of Salas. He argues the attempted murder was not a reasonably foreseeable consequence of a plan to shoot Castro as a matter of internal gang discipline.

An aider and abettor is guilty not only of the offense he or she intended to facilitate or encourage (the target crime), but also of any other crime committed by the person he or she aids and abets that is the natural and probable consequence of the target

crime. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 261.) An aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed and need not have the specific intent otherwise required for the offense committed. (*Ibid.*, *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

A particular criminal act is a natural and probable consequence of another criminal act if, under all of the circumstances presented, a reasonable person in the defendant's position would or should have known the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) Whether the act committed was the natural and probable consequence of the act encouraged and the extent of defendant's knowledge are questions of fact for the jury. (*People v. Durham* (1969) 70 Cal.2d 171, 181.)

Reyes and Loaiza both knew Salas and others lived at the house. Each defendant had visited Salas and Christina Gonzalez at the house within the two weeks before November 1. The crimes occurred in the early evening hours. It was therefore reasonably foreseeable Salas and other people would be at the house and in the neighborhood. The neighborhood was claimed by the Puente gang, of which Castro, just released from prison, was a high-ranking member. Salas testified "everyone knew" Castro's release date, and the jury could disbelieve Loaiza's denial he knew it. Accordingly, it was reasonably foreseeable Salas, other residents of the house, neighbors, and perhaps other members of the gang would be present to welcome Castro home from prison. Given the gang connections, it was also reasonably foreseeable some of those present would be in possession of, or have ready access to, firearms. It was thus reasonably foreseeable people other than Castro would be around to witness the murder and some of them might use their own guns to attempt to protect Castro, retaliate against Reyes, or prevent Reyes and Loaiza from escaping. It appears at least part of Loaiza's role in the plan was to deal with witnesses, and he carried a loaded weapon to do so. Under all of these circumstances, a reasonable person in Reyes' position would or should have known that shooting a witness, such as Salas, was a reasonably foreseeable

consequence of Loaiza's participation in the plan to shoot Castro at Salas' house. Reyes was not required to foresee the shooting of Salas, as opposed to any other person who witnessed the crime.

Moreover, the same evidence that supports an inference defendants both acted pursuant to a pre-existing plan makes Reyes liable as an aider and abettor without resort to the natural and probable consequences doctrine.

Accordingly, substantial evidence supports Reyes' liability as an aider and abettor for the attempted murder of Salas.

c. Finding attempted murder was willful, deliberate, and premeditated

Defendants argue there was insufficient evidence of premeditation and deliberation with respect to the attempted murder of Salas. Reyes argues a premeditated attempt to kill Salas was not a reasonably foreseeable consequence of a plan to kill Castro, and the evidence was therefore insufficient to establish his liability as an aider and abettor.

As with the murder, the record includes substantial circumstantial evidence supporting the finding the attempted murder was willful, deliberate, and premeditated. Defendants' coordinated conduct without additional communication between themselves after they arrived at Salas' house and the immediacy and certainty of Loaiza's action after Reyes shot Castro constitute ample circumstantial evidence that defendants planned to shoot witnesses. In particular, Loaiza expressed no surprise, uncertainty, or hesitancy before aiming and firing his gun directly at his unarmed, unresisting, unmoving friend Salas, who raised his hands, as if surrendering.

The manner of the shooting also reflects premeditation and deliberation. Loaiza modified his aim from Salas' head to his torso, which presented a larger and easier target, especially at a distance of about 18 feet.

The evidence also presented a clear motive for killing Salas or any other witness, i.e., to prevent them from identifying defendants and testifying against them. With respect to Salas, in particular, the motive was even stronger. Detective Kays testified a

former member who left the gang, as Salas had, would be viewed as a weak person. In addition, Salas knew defendants well and could readily identify them.

Viewing the evidence in the light most favorable to the judgment, substantial evidence supported a reasonable conclusion that an aspect of defendants' plan to shoot Castro was that Loaiza would carry a loaded gun and, if necessary, fire it at witnesses to prevent them from foiling the plan, retaliating, blocking defendants' escape, or being able to identify defendants and testify against them. This supported the jury's findings that the attempted murder of Salas was willful, deliberate, and premeditated.

d. Gang enhancement findings

Penal Code section 186.22, subdivision (b), provides a sentence enhancement for anyone convicted of a felony "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Subdivision (f) of section 186.22 defines "criminal street gang" as an "ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in ... subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Section 186.22, subdivision (e) lists numerous crimes, including homicide, assault with a deadly weapon, burglary, shooting at an inhabited dwelling, and sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture, controlled substances. The attempted commission of such offenses also falls within subdivision (e) of section 186.22.

Defendants contend, inter alia, the evidence did not establish that the offenses in this case were committed for the benefit of, at the direction of, or in association with a criminal street gang. We agree.

The only evidence arguably supporting the gang enhancement consisted of the gang membership of defendants and the victims and Detective Kays' responses to the prosecutors' lengthy and detailed hypothetical questions:

"Q. Now, if you had a member from the Tinflanes clique of Puente and a member of the Ballista clique of Puente go together to a location, and one of them shoots another member of the Tinflanes gang and kills him, and that location is in Tinflanes territory, do you have any opinion as to whether or not that crime is done in association with or for the benefit of the Puente gang?

"A. Yes.

"Q. What is your opinion?

"[Counsel for Reyes]: Objection. Lack of foundation.

"The Court: Overruled.

"The Witness: My opinion, as you stated, that you've got three gang members, one from Tinflanes, one from Ballista, who are allies, that shoot and kill a Tinflanes gang member in the middle of the area, my opinion is that they're sending a very strong message to the rest of the gang that, number one, where it occurred, it occurred in their neighborhood, where there's a certain amount of safety expected.

"Maybe they were righting a wrong; that's speculation on my part. They felt that they had to carry out this assault or what they call 'regulate.' 'Regulate' is something that they will put members of their gang in check. If they've done something wrong, if they've committed a crime that's brought negative light on the gang, if they've done something for any reason that brings negative light on the gang, the gang is going to turn on that member. The regulation can range anywhere from a simple battery or a beating, to murder."

"[¶] ... [¶]

"Q. Okay. Stay with that same scenario of the Tinflanes and Ballista guys going over to that location in Tinflanes territory, one of them shoots and kills the other Tinflanes member, Tinflanes victim, and that's actually the Ballista clique member shoots and kills the Tinflanes member, and then the Tinflanes suspect shoots and hits someone who had previously been from the Dial Street clique but who a couple of months beforehand had been jumped out of the gang.

"Does that add any helpful information to you as to whether or not this was done to benefit the gang?

"A. Yes. The fact that there's another individual there from Dial who is kind of an 'on again/off again' alliance with Tinflanes and Ballista, if that individual has been jumped out with the gang culture --

"...

"If there's an individual present when this occurred that had been jumped out, they've got no standing from the gang, they've got no respect from the gang, and they are actually looked at as somebody, depending on the individual, but they could be viewed as being weak, that they didn't -- they weren't down for the gang anymore. They won't be

down for the lifestyle, they chose to get out, so they are going to have no free pass on something like this.

“If they witnessing [*sic*] this occurring, they are not looked at as a gang member anymore. They are looked at as somebody less than even somebody from the public, somebody that got jumped out.

“Q. So even if we were to assume that the Tinflanes victim, the one that was shot and killed, was the original target, and the other person, the ex-Dial Street member, just happened to be there, wrong place, wrong time, the act of shooting him would still be done, in your opinion, to benefit the gang for what reasons?

“A. It would be the same reasons for shooting and killing the first individual. It’s to send a message that we’re -- we’ve got no problem with killing one of our own.

“And my opinion also is that they don’t want to leave a witness. They don’t want to leave someone there that’s going to be able to identify who did the actual murder. So with them being jumped out, not being looked at as a fellow gang member, he’s being looked at as someone less favorable. And obviously they don’t want to leave someone there that can identify them.

“Q. In your experience, how do these type of acts impact the surrounding community, including people that are not affiliated with any gang?

“A. It makes it very difficult to investigate. Obviously we do have people that live in fear in these neighborhoods. They witness these things occurring. They know the individuals. They see them on a daily basis. We go and talk to them, investigate these crimes, and they’re scared to death. They don’t want to talk to us. They will elect to keep the information to themselves rather than provide it to us so we can identify the individual and hopefully make an arrest. ...”

On redirect examination, the prosecutor asked a more comprehensive version of his hypothetical questions:

“Q. Let me ask you another hypothetical question with a few more details. [¶] Assuming that a Ballista member armed with a gun and a Tinflanes member armed with a gun go to a residence in the Tinflanes territory, and they go there to target another Tinflanes member who has just gotten out of prison that day. The Ballista member armed with a gun invites the Tinflanes member into his car. The Ballista member seated in the driver’s seat, Tinflanes victim seated in the passenger seat, and outside the car in the area is the other Tinflanes suspect who came armed with a gun and a person would [*sic*] had just been jumped out a couple months earlier from the Dial Street gang.

“Inside the car, the Ballista member pulls out a gun and shoots the Tinflanes member seated in the passenger seat. After that there’s a struggle over the gun. Immediately the Tinflanes member who is outside the car then pulls out a gun from his waistband and shoots the person who had recently been jumped out of the Dial Street gang.

“With those facts, do you have an opinion as to whether or not that crime would be for the benefit of the Puente gang?”

“A. Yes.

“Q. How so?”

“A. The fact that they both arrive there together, both armed with handguns. It appears from that scenario there may have been a plan to set up that way to get the intended victim into the car. The other individual standing outside shooting the individual who had just been jumped out who has no -- is not in good standing with the gang is a potential witness that could identify them in the crime. My opinion would be that it would be for the benefit of their reputation and the reputation of their gang, that that would be a form of righting a wrong or regulating that Tinflanes gang member who was actually shot in the car.”

Kays’ testimony regarding “righting a wrong” and “regulating” was inherently and expressly speculative. The prosecutor did not include in his hypothetical any mention of the murder victim wronging the perpetrators or the nature of such a wrong. More importantly, the record does not demonstrate that Salas or Castro had done anything the gang would want to “regulate.” Had Castro testified against another gang member, for example, Kays’ testimony would have some support in the record. Nothing, however, supports Kays’ speculation that the gang would want to “regulate” Castro for his rumored involvement in Santini’s murder. Rather, revenge for Santini’s death was a wholly personal -- not gang-related -- motive for the defendants. Nor is there any indication in the record that the gang actually sanctioned any of the charged crimes. Notably, no members of the gang other than Santini’s relatives participated in the charged offenses.

The circumstances of the crime also fail to support a finding the defendants acted for the benefit of, at the direction of, or in association with any criminal street gang. The crimes did not occur in rival gang territory. The victims were members of the defendants’ own gang, not of a rival gang. Although the four men belonged to three different cliques, the cliques were not hostile to one another. Moreover, the men had bonds of blood and friendship. Neither defendant made gang hand signs or proclaimed the name of his gang or clique before, during, or after the shootings. As far as the record reveals, neither the defendants nor any other member of their gang took credit for the shootings, either verbally or in graffiti. Unlike a typical gang shooting in which the gang

defends its turf or strikes a blow against a rival gang, the charged offenses bestowed no plausible benefit to defendants' gang. Indeed, Castro's murder cost the gang one of its high-ranking members, which would appear to be an undesirable consequence from the gang's viewpoint.

In short, nothing except implausible inferences and hypotheticals based upon speculation supported the gang enhancements. Two gang members acting in concert do not inevitably act for the benefit of, at the direction of, or in association with their gang every time they commit a crime. Defendants were "on a frolic and detour unrelated to the gang" (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198), not acting for the benefit of, at the direction of, or in association with the gang when they committed the charged offenses. Accordingly, the gang enhancement findings with respect to counts 1, 2, and 5 must be reversed.

We further conclude the gang allegations may not be retried. In *People v. Seel* (2004) 34 Cal.4th 535, the California Supreme Court determined that when a sentence enhancement "'is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.'" (*Id.* at pp. 546-547, quoting from *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, fn. 19 [120 S.Ct. 2348].) Relying on *Apprendi*, the *Seel* court barred retrial of a premeditation finding supported by insufficient evidence because premeditation is an element of the crime of attempted murder and not a mere sentencing enhancement. (*People v. Seel, supra*, 34 Cal.4th at p. 550.)

A defendant is entitled to a jury trial on the elements of an enhancement statute such as Penal Code section 186.22. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) By parity of reasoning with *People v. Seel, supra*, 34 Cal.4th 535, further adjudication on the gang allegations is therefore barred under the doctrine of double jeopardy, and on remand the allegations must be dismissed.

2. Denial of motion to bifurcate gang enhancement allegations

Reyes timely moved to bifurcate trial of the gang enhancement allegations. He argued that because the prosecution's theory was that the motive for Castro's murder was "some sort of family-related revenge" for Santini's murder, the gang aspects were irrelevant to the trial of the charges. He further argued the evidence supporting the gang enhancements would be unduly prejudicial. Loaiza joined in the motion.

The prosecutor explained the gang evidence was "crucial" to trial of the charged offenses because Castro's murder was not simply a matter of familial revenge, but was also "a gang taking care of business in-house." The prosecutor explained if it were simply a family matter, Loaiza would have been the one to shoot Castro, but in fact Reyes shot him. Neither defendant informed the court Reyes was also related to Santini. The court denied the motion, stating it appeared the gang evidence would be relevant to motive and would assist the jury in understanding the facts of the case.

Defendants contend the trial court erred by denying the motion to bifurcate the gang enhancement allegations. They argue the court did not have an accurate view of the facts because it did not know Reyes was also related to Santini. They suggest wrongdoing by the prosecutor in arguing a theory he "should have had reason to suspect was wrong." Alternatively, Reyes argues his attorney rendered ineffective assistance by failing to inform the court he was also related to Santini.

A gang enhancement allegation differs from a prior conviction allegation in that it is "attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048.) The need to bifurcate a gang enhancement allegation is therefore far less than for a prior conviction allegation, and the trial court has broader discretion in determining whether to bifurcate a gang enhancement allegation than in making the same determination regarding a prior conviction enhancement allegation. (*Ibid.*) A defendant must "clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*Id.* at p. 1051, quoting *People v. Bean* (1988) 46 Cal.3d 919, 938.) We review the ruling

for abuse of discretion in light of the showing made to the trial court and the facts then known, not in light of what happened at trial. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244, 1246.)

The evidence of defendants' and Castro's gang membership was relevant to assist in establishing a motive for Castro's murder. Although revenge for Santini's murder was a component of the prosecution's theory of motive, the complete theory was that the murder was a matter of internal gang discipline ultimately based, at least in part, upon Santini's murder. The prosecutor was entitled to put his complete theory of motive before the jury. This was especially true at the time defendants sought bifurcation, as it appears all counsel then believed only Loaiza was related to Santini. The gang discipline theory was thus an important part of the case the prosecution intended to present, as it provided a motive for Reyes's participation. The prosecution's ultimate failure to introduce substantial evidence in support of the gang-related motive did not invalidate the trial court's ruling on the motion to bifurcate.

Defendants' attempts to blame the prosecutor or Reyes' counsel for failing to inform the court Reyes was also related to Santini fail because the record does not demonstrate either attorney knew of the relationship between Reyes and Santini.

Even considering the additional information that Reyes and Santini were related, denial of bifurcation was not an abuse of discretion. The prosecutor was entitled to prove his complete motive theory, of which gang discipline was an important aspect. This would have required admission of defendants' and Castro's gang memberships and expert testimony about the internal discipline theory. The cross-admissibility of at least that much of the gang evidence weighed heavily against bifurcation of the enhancement allegations, and defendants failed to clearly show a substantial danger of prejudice. They simply argued the case was not gang-related, and offered no reply to the prosecutor's explanation of the gang motivation. Moreover, the gang evidence also proved to be relevant to Loaiza's defense, in that he testified and argued he carried a loaded gun to the crime scene not because he was part of any plan to kill Castro, but because he wanted it

for self-protection and had grown accustomed to carrying a gun when he was an active gang member. Loaiza's explanation also potentially benefitted Reyes, in that he explained gang members commonly carried guns to defend themselves against members of rival gangs. Given the cross-admissibility of the evidence, the denial of the motion to bifurcate was not an abuse of discretion.

3. Admission of gang expert's testimony

Reyes filed a motion in limine to limit or exclude expert testimony regarding gangs to the extent it predicted behavior of a gang member; constituted "profile" evidence; or pertained to whether each defendant had a role to play, knew the other defendant was armed, aided and abetted the other defendant, or was an active participant in a gang. Loaiza joined in the motion. At the hearing, Reyes indicated he was specifically concerned with testimony regarding theories of motive and aiding and abetting. The prosecutor represented he would not ask his expert "to come up with a theory," but would ask about how gang members work together. The court declined to exclude or limit the gang testimony.

a. Detailed hypothetical questions embracing ultimate issues of fact

Defendants first contend that Kays responded to overly detailed hypothetical questions from the prosecutor that mirrored the facts of this case, and thereby improperly testified to ultimate issues of fact, such as motive, intent, and a plan to kill Castro.⁷

Defendants objected to neither the form of the prosecutor's questions nor the content of Kays' answers. They therefore forfeited these claims. (*People v. Williams* (1997) 16 Cal.4th 153, 208 (*Williams*).)

Even assuming defendants' claims were preserved for review, they lack merit. The court's admission of evidence is reviewed only for abuse of discretion. (*Williams, supra*, 16 Cal.4th at p. 197.) A trial court has wide discretion to admit or exclude expert

⁷ The hypothetical questions and Kays' responses are set forth in the section

testimony. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) Where, as here, a gang enhancement is alleged, “expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are ‘sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’” (*Ibid.* quoting Evid. Code, § 801, subd. (a).) The gang expert may testify to an opinion based upon facts shown by the evidence and restated in a hypothetical question asking the expert to assume the truth of those facts. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.) An expert may not, however, opine the defendant had particular knowledge or a specific intent. (*Ibid.*; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513.) Specificity and detail in a hypothetical question asked of an expert do not convert an otherwise proper answer into a prohibited opinion regarding a defendant’s subjective mental state. (*People v. Ward* (2005) 36 Cal.4th 186, 209-210.) “[T]here is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read [*People v. Killebrew* (2002) 103 Cal.App.4th 644] as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons.” (*Gonzalez, supra*, 38 Cal.4th at p. 946, fn. 3.)

Despite the great specificity in the prosecutor’s hypothetical questions to Kays, the prosecutor never asked about defendants’ mental states, e.g., whether either defendant had particular knowledge or intent, or what motivated either defendant. All of the questions addressed hypothetical actors. Kays never testified regarding either defendant’s intent, motive, or knowledge. He instead testified if the facts stated in the hypothetical were true, the hypothetical actors would be acting for the benefit of the gang by sending a message, possibly righting a wrong or regulating a fellow gang member, and eliminating a witness. Similarly, with respect to gang intimidation of witnesses, the prosecutor did not ask about the mental state or motivations of Christina and Gilbert Gonzales, and Kays did not purport to testify they denied knowledge of the crimes

addressing the sufficiency of the evidence supporting the gang enhancement findings.

because they had been intimidated. Kays instead testified generally about the reluctance of gang crime witnesses to talk to the police.

Furthermore, opinion evidence is admissible even if it encompasses the ultimate issue in the case. (Evid. Code, § 805; *Valdez, supra*, 58 Cal.App.4th at p. 506.) “‘There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case.’” (*Valdez, supra*, 58 Cal.App.4th at p. 507, quoting *People v. Wilson* (1944) 25 Cal.2d 341, 349.) The opinion must not, however, invade the province of the jury to decide a case. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182-1183.) Expert opinion regarding whether and how a crime would have been committed for the benefit of a gang has repeatedly been deemed admissible, despite its coincidence with an issue to be determined by the jury. (See, e.g., *Garcia, supra*, 153 Cal.App.4th at pp. 1513-1514; *Valdez, supra*, 58 Cal.App.4th at p. 509.) “Such an opinion was not tantamount to an opinion of guilt or, in this case, that the enhancement allegation was true, for there were other elements to the allegation that had to be proved.” (*Valdez, supra*, 58 Cal.App.4th at p. 509.)

The prosecutor’s hypothetical questions to Kays addressed a single element of the gang enhancement allegations, i.e., whether the crimes were committed in association with, or for the benefit of, the Puente gang. Kays did not provide an opinion on each element and did not testify that the enhancement allegation was true or that defendants were guilty of the charged offenses. The prosecutor was required to prove the remaining elements of the enhancement, as well as the elements of the charged offenses. The jury was permitted to draw its own inferences about defendants’ intent, motive, premeditation, deliberation, and the elements of the gang enhancement allegation. Furthermore, the jury was instructed it was not bound by an expert opinion, it could disregard any opinion it found to be unreasonable, the weight to be given an opinion was for the jury to decide, the facts of any hypothetical question were not necessarily true, and the prosecution had the burden of proving defendants guilty beyond a reasonable doubt. Under the

circumstances, Kays' opinion testimony did not infringe upon, much less usurp, the function of the jury.

b. Section 29

Defendants also contend Kays' testimony violated section 29, which prohibits an expert witness who is "testifying about a defendant's mental illness, mental disorder, or mental defect" from testifying "as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged."

Defendants did not object on this ground in the trial court, and therefore forfeited any claim based upon section 29. Had they preserved the issue, however, it would have no merit, as Kays did not testify about either defendant's mental illness, mental disorder, or mental defect.

c. Foundation

Defendants further contend Kays' opinions lacked foundation. Defendants arguably preserved this claim with respect to Kays' testimony in response to the prosecutor's first hypothetical question.

In any event, the contention lacks merit. Kays testified he had been a gang investigator for the Sheriff's Department for 13 years, and he became aware of the Puente gang in the late 1980's when he was first assigned to the Sheriff's Industry substation. In the course of his work, he had become familiar with Puente members by detaining them, talking to them on the street, investigating crimes they committed, and arresting them. He estimated he had had contact with 100 to 150 Puente gang members, from various cliques. This training and experience constituted an adequate foundation for Kays' expert testimony regarding gang culture, habits, attitudes, and behavior. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370 [officer's investigations of gang cases, interviews with gang members and others, and review of police reports provided sufficient foundation for his expert testimony].)

d. Helpful to the jury

Defendants also contend Kays' testimony was not helpful to the jury, which was capable of understanding the motives involved in the crime. Defendants did not object on this ground in the trial court, and therefore forfeited it. Even had the claim been preserved, it would lack merit. The "culture, habits, and psychology of gangs" are "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*Valdez, supra*, 58 Cal.App.4th at p. 506, quoting Evid. Code, § 801, subd. (a).) Although the jury could readily have understood the personal revenge motive for the crimes, the way in which the crimes purportedly benefitted the gang was far from obvious and was therefore a proper subject for expert testimony.

e. Predictive/profile evidence

Defendants further contend Kays' testimony constituted improper predictive or profile evidence, i.e., "testimony purporting to predict the defendant's behavior based on matching behaviors." Although defendants raised this ground in their motion in limine, they did not object at trial and therefore forfeited their claim.

In any event, their claim has no merit. "A profile ordinarily constitutes a set of circumstances -- some innocuous -- characteristic of certain crimes or criminals, said to comprise a typical pattern of behavior. In profile testimony, the expert compares the behavior of the defendant to the pattern or profile and concludes the defendant fits the profile." (*People v. Prince* (2007) 40 Cal.4th 1179, 1226.) Kays' testimony did not refer to defendants, much less evaluate their behavior against a pattern or profile. He did not opine defendants were guilty of the charged offenses or the gang enhancements were true, either because defendants fit a profile or for any other reason.

f. Propensity evidence

Defendants contend Kays' testimony regarding their gang membership, the gang's primary activities, and the predicate offenses was inadmissible propensity evidence. Defendants did not object on this ground in the trial court, and therefore forfeited it. Even if defendants preserved the claim, however, it would lack merit.

Although evidence of other offenses or misconduct is inadmissible to prove criminal propensity, it may be admitted to prove matters such as motive, intent, identity, etc. (Evid. Code, § 1101, subds. (a), (b).) Here, Kays' testimony regarding defendants' gang membership, the primary activities and predicate offenses for the Puente gang, and his expert opinion testimony was relevant to attempt to prove the gang enhancement allegations. Moreover, Kays' testimony regarding the primary activities and predicate offenses was not specific to either defendant and therefore had no tendency to imply *they* were predisposed to commit such crimes.

g. Evidence Code section 352

Defendants contend the gang evidence should have been excluded under Evidence Code section 352 because its slight probative value was substantially outweighed by the probability its admission would create a substantial danger of undue prejudice or jury confusion. Defendants did not raise this objection in the trial court, and therefore forfeited it. In any event, defendants' claim has no merit.

Evidence Code section 352 provides the court with discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. The type of prejudice Evidence Code section 352 seeks to avoid is not the damage to the defense that naturally results from relevant evidence, but the tendency to prejudge a person or cause on the basis of extraneous factors. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) The gang evidence here was essential to attempt to prove the gang enhancement allegations and relevant to establish the prosecution's theory of motive. Its probative value was not substantially outweighed by its prejudicial potential. Jurors were instructed not to consider the gang evidence as proof defendants were persons of bad character or predisposed to commit crimes. Admission of the evidence was not an abuse of the trial court's discretion under Evidence Code section 352.

h. First Amendment

Defendants further contend Kays' testimony violated their First Amendment rights because it permitted them to be put on trial for their association with gang members. They did not raise this claim in the trial court, and have therefore forfeited it. Even constitutional claims and objections must generally be raised in the trial court in order to preserve them for appeal. (*People v. Waidla* (2000) 22 Cal.4th 690, 718, fn. 4; *Williams, supra*, 16 Cal.4th at p. 250.) Moreover, defendants' claim has no merit. They were not tried or convicted for their membership in a gang or association with gang members, but for committing the charged offenses.

i. Eighth Amendment

Defendants also contend that "[b]y convicting and incarcerating [them] through trial-by-character, the government violated the Eighth Amendment prohibition of cruel and unusual punishment." Defendants forfeited this claim by failing to raise it in the trial court. In any event, the claim has no merit, as defendants were convicted upon the admission of evidence establishing their guilt of the charged offenses and enhancements beyond a reasonable doubt, not evidence of bad character. Imprisoning them as authorized by statute for the offenses of which they were convicted does not constitute cruel and unusual punishment.

j. Due process

Finally, defendants contend the admission of Kays' testimony violated due process by rendering their trial fundamentally unfair and reducing the prosecutor's burden of proof. Defendants forfeited this claim by failing to raise it in the trial court. Even had defendants preserved their claim, however, it would have no merit. The admission of evidence may violate due process if there is no permissible inference a jury may draw from the evidence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1246; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229.) Here, there were numerous permissible inferences to draw from the gang evidence, such as that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to

promote, further, or assist in criminal conduct by gang members. Moreover, “the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*.” (*People v. Partida* (2005) 37 Cal.4th 428, 439.) The gang evidence introduced at defendants’ trial was limited in scope and purpose. The jury was properly instructed on permissible and impermissible uses of this evidence. In short, the gang evidence did not render their trial fundamentally unfair.

4. Kays’ reference to Reyes’ “cases”

Before trial, Reyes objected to the gang expert’s mentioning Reyes’ prior convictions as a basis for his opinion that Reyes was a member of the gang. The prosecutor said he did not anticipate “trying to introduce those for that purpose.”

Kays testified he knew Reyes, but had not had personal contacts with him. The prosecutor asked how Kays knew Reyes, and Kays replied, “Through speaking with other investigators in my office that have had cases involving Mr. Reyes, personal contact and conversations with him, and his admission to them that he was a member of the Puente gang.” Reyes did not object.

Reyes now contends that Kays’ reference to his “cases” was incurably prejudicial, violated due process, and requires reversal. He argues that, in light of his stipulation to a prior conviction, jurors would understand “cases” to mean cases against Reyes, rather than cases in which he was a witness or victim. He argues his failure to object or request a mistrial was preserved by his pre-trial objection, excused as futile, or constituted ineffective assistance by trial counsel.

Assuming, for the sake of argument, Reyes’ claim was preserved for review or would be reached in addressing his claim of ineffective assistance of counsel, it has no merit. Reyes’ contention assumes evidence of his prior “cases” was inadmissible. Although evidence of other offenses or misconduct is inadmissible to prove criminal propensity, such evidence may be admitted to prove matters such as motive, intent,

identity, a common design or plan, etc. (Evid. Code, § 1101, subds. (a), (b).) Kays' testimony was introduced to establish a matter other than criminal propensity, i.e., Reyes' membership in the Puente gang. Thus, Kays might permissibly have testified that prior gang-related offenses or misconduct by Reyes led him to believe Reyes was a gang member. Such evidence would, of course, be subject to discretionary exclusion under Evidence Code section 352. Because Kays had other, less potentially prejudicial bases for his opinion that Reyes was a gang member, it is probable the trial court would have excluded the reference to "cases" had it been given an opportunity to rule on the point.

Any error, however, was merely a violation of state law, not due process. Due process is not necessarily violated by the admission of evidence of a defendant's prior misconduct. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70, 112 S.Ct. 475; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564, 87 S.Ct. 648.) The admission of relevant evidence results in a due process violation only if it makes the trial fundamentally unfair. (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly." (*Dowling v. United States* (1990) 493 U.S. 342, 352, 110 S.Ct. 668.)

Kays' reference to Reyes' "cases" did not infringe upon any specific guarantee in the Bill of Rights. It also was not of a quality to necessarily prevent Reyes from receiving a fair trial. Kays did not elaborate upon the number or nature of the "cases." The reference was simply too brief and vague to provide jurors with any basis upon which they could draw a propensity inference that was stronger or more prejudicial than that inherent in the stipulation Reyes had a prior conviction. Moreover, the prosecutor presented a strong case against Reyes. Salas' testimony established that Reyes was the person who shot Castro. As discussed in the context of the sufficiency of evidence, defendants' conduct strongly demonstrated a pre-existing plan to kill Castro and eliminate any witnesses who were present. Under the circumstances, Kays' brief reference to Reyes' "cases" did not make the trial fundamentally unfair.

Absent fundamental unfairness, the error, if any, was subject to harmless error review under *People v. Watson* (1956) 46 Cal.2d 818, 836, i.e., reversal is required only if it is reasonably probable Reyes would have obtained a more favorable outcome absent the error. For the reasons addressed in the preceding paragraph, a more favorable verdict for Reyes was not reasonably probable.

5. Voluntariness of Loaiza's statement to police

During voir dire, Loaiza moved to suppress the statement he made to police on the grounds his statement was involuntary and obtained in violation of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. The trial court conducted an evidentiary hearing at which Detective Steve Rubino and Loaiza testified.

In pertinent part, Rubino testified Loaiza was not handcuffed, did not appear to be under the influence of anything, and appeared to be rested and capable of conversing with the detectives. Near the middle of the interview, either Rubino or his partner showed Loaiza a Department of Motor Vehicles (DMV) photograph of Santini, followed by two coroner's photographs depicting her face and body. Loaiza did not appear to be "visibly shaken" by the photographs, but he might have been upset. Loaiza did not make any inculpatory statements before he was shown the coroner's photos. And he did not change his story immediately after seeing the photographs. He continued to deny complicity in the offenses. The detectives only displayed the coroner's photographs to Loaiza for a minute or two, not the duration of the interview. The court reviewed the photographs Rubino and his partner showed Loaiza and the edited transcript of the interview the parties prepared for trial.⁸

Loaiza testified he did not know how many times, or where, Santini had been shot. When the detectives showed him the coroner's photographs of her, Loaiza felt physically ill, angry, and sad. The police also said they thought Castro killed Santini. When asked why he changed his story and admitted he was at the scene of the charged offenses,

⁸ The full transcript is not part of the appellate record.

Loaiza replied, “I mean, they are showing you pictures like that, and you already feel some of their authority, and they are surrounding you, obviously, and, well, yeah, you know, get them off my back, you know.” Loaiza agreed the photographs of Santini and the statements of the officers about Castro’s purported involvement in her death had an “impact on [his act of] eventually admitting that [he was] at the scene” of the charged offenses. Loaiza also testified that the detectives left the coroner’s photographs on the table in front of him for five to ten minutes. Loaiza nonetheless admitted his eventual admissions to the detectives were truthful.

Rubino testified in rebuttal that only he and Detective Okada were in the interview room with Loaiza, and neither one had his gun out at any time.

The trial court found Loaiza’s statement was voluntary. The court noted when the detectives raised the subject of Santini, Loaiza stated he heard she was caught in crossfire, thereby indicating he knew Santini had been shot. The court further noted Loaiza continued to deny he was present at the scene of the charged crimes for some time after the detectives showed him the photographs. The court concluded the detectives’ methods did not override Loaiza’s free will.

Defendants contend Loaiza’s statement was involuntary and its admission violated due process. They based this claim on the display of the photographs and the statements by the detectives “baiting him about Castro deserving it, and explaining [that]. they understood what he did”

If the totality of the circumstances shows the police obtained a statement by applying physical or psychological influences that overcame a defendant’s free will, the statement is inadmissible. (*People v. Massie* (1998) 19 Cal.4th 550, 576.) Relevant factors include evidence of police coercion; the length of the interrogation, along with its location and continuity; and the defendant’s maturity, education, physical condition, and mental health. (*Ibid.*) No single factor is dispositive. (*People v. Neal* (2003) 31 Cal.4th 63, 79.) The police are prohibited from using only those psychological ploys that, under all the circumstances, are so coercive they tend to produce a statement that is both

involuntary and unreliable. (*People v. Jones* (1998) 17 Cal.4th 279, 297-298.) The prosecution bears the burden of voluntariness by a preponderance of the evidence. (*People v. Markham* (1989) 49 Cal.3d 63, 71.)

On appeal, we independently review the trial court's determination of voluntariness. However, we accept the trial court's factual findings regarding the circumstances surrounding an admission or confession if they are supported by substantial evidence. (*People v. Williams* (1997) 16 Cal.4th 635, 659-660.) With respect to conflicting testimony, we must accept the version of events most favorable to the prosecution, to the extent it is supported by the record. (*People v. Thompson* (1990) 50 Cal.3d 134, 166.)

A review of the edited transcript reveals Loaiza initially told detectives that Santini was shot and Castro was rumored to have killed her. The detectives then repeatedly told Loaiza they knew, based on witnesses' statements, that Loaiza was present and fired shots at the scene of the charged offenses. They repeatedly told him, in essence, they sympathized with him and understood why he wanted to kill Castro. Somewhere in the midst of this, the detectives showed him the photographs of Santini, yet Loaiza continued to insist the witnesses were lying, and deny not only his involvement, but also his presence at the scene. The detectives implied a bullet found at Loaiza's house ballistically matched bullets "from the scene," and Loaiza said that was impossible. Near the end of the interview, Loaiza made a very limited admission he was present, thought someone was shooting at him, fired some shots, ran away, and discarded his gun as he decamped.

The totality of the circumstances supports the trial court's conclusion that Loaiza's statement was voluntary and admissible. Loaiza was an adult and obviously intelligent. There is no evidence he was tired, hungry, thirsty, weak, injured, or otherwise physically or mentally impaired. Despite Loaiza's reference to "feel[ing] some of their authority," nothing indicates the circumstances were inherently coercive. Moreover, Loaiza continued to deny his presence at, or knowledge of, the charged offenses despite feeling

the detectives' "authority." Although it is difficult to determine the duration of the interview from the edited transcript, Loaiza did not claim the length of the interrogation wore down his free will.⁹ It is also difficult to determine how much time elapsed before and after the detectives showed Loaiza the coroner's photographs. Although Loaiza testified the photographs made him feel physically ill and emotional, the record shows Loaiza continued to deny he was even present at the scene of the charged offenses long after the detectives showed him the photographs and made empathetic statements about a desire to retaliate against Castro.¹⁰ It is noteworthy Loaiza testified the photographs and the detectives' statements had an "impact" on his ultimate admission, not that they overcame his free will. Nothing in the record, including Loaiza's testimony, shows the detectives applied any physical or psychological influences that overcame Loaiza's free will. The mere fact Loaiza eventually changed his mind and made a limited admission does not itself indicate involuntariness, absent coercive conduct or circumstances. (*People v. Lewis* (2001) 26 Cal.4th 334, 383.) Accordingly, the trial court properly denied the motion to exclude the statement.

6. Refusal to instruct on voluntary manslaughter under the theory of heat of passion

Defendants contend the trial court erred by refusing their request to instruct on voluntary manslaughter under the theory of heat of passion as a lesser included offense of murder.

Voluntary manslaughter consists of an unlawful killing upon sudden quarrel or heat of passion or in an actual, but unreasonable, belief in the need to defend against imminent death or great bodily injury. (Pen. Code, § 192, subd. (a); *In re Christian S.* (1994) 7 Cal.4th 768, 783.)

⁹ Rubino testified at trial the entire interview lasted about an hour.

¹⁰ Rubino testified at trial that statements the detectives made about Castro's involvement in Santini's death were "way after" the detectives showed Loaiza the

In order to prove sudden quarrel or heat of passion, defendant must show he actually acted in the heat of passion, following adequate provocation. (*People v. Wickersham* (1982) 32 Cal.3d 307, 326-327 (*Wickersham*), disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186.) The claimed provocation must be sufficient to cause a reasonable person under the same circumstances to act rashly, without deliberation and reflection, from passion rather than from judgment. (*Wickersham*, at p. 326; *People v. Barton*, at p. 201.) If the killing takes place long enough after the provocation for the passion to subside and reason to return, the heat of passion theory does not apply. (*Wickersham*, at p. 326.) Heat of passion may not be based upon revenge. (*People v. Williams* (1995) 40 Cal.App.4th 446, 453.)

Doubts as to the sufficiency of the evidence to warrant instruction on heat of passion must be resolved in favor of the defense. (*People v. Flannel* (1979) 25 Cal.3d 668, 685.) However the trial court need not give a requested instruction unless it is supported by substantial evidence. (*People v. Marshall* (1997) 15 Cal.4th 1, 39.)

Viewing the record in the light most favorable to defendants, there was no evidence to support a heat of passion theory. Santini was murdered August 8, 2004. The charged offenses occurred more than a year later on November 1, 2005. This was certainly long enough for passion to subside. Moreover, killing Castro was essentially an act of revenge. And there was no proof of the subjective element of acting from passion and without reflection with respect to either defendant. At most, the evidence showed defendants were upset by Santini's murder. Loaiza expressly denied he was angry with Castro about Santini, and Reyes did not testify. Reyes' mother testified Reyes was "hurt" when he learned of Santini's death, but she denied they heard Castro might have been responsible. Accordingly, there was no proof they acted from passion and without reflection. The trial court did not err by refusing to instruct on voluntary manslaughter,

coroner's photos.

as substantial evidence did not support the theory. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.)

7. Instruction with CALJIC Nos. 5.30 and 5.51 (count 2)

At Loaiza's request, the trial court instructed on attempted voluntary manslaughter on the theory of unreasonable self-defense as a lesser included offense of attempted murder.¹¹ The trial court also instructed, without objection or request for modification, with CALJIC Nos. 5.30 and 5.51.¹²

¹¹ The trial court used CALJIC Nos. 5.17 and 8.41 for this purpose.

As given, CALJIC No. 5.17 provided as follows:

"A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary manslaughter.

"As used in this instruction, an 'imminent' peril or danger means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer.

"However, this principle is not available, and malice aforethought is not negated, if the defendant by hisher [*sic*] unlawful or wrongful conduct created the circumstances which legally justified hisher [*sic*] adversary's use of force, attack or pursuit.

"This principle applies equally to a person who kills in purported self-defense or purported defense of another person."

The court gave the following modified version of CALJIC No. 8.41:

"Attempted Voluntary Manslaughter is a lesser and necessarily included offense to the crime of Attempted Murder in Ct 2. If you unanimously agree that the defendant, Ronald Loaiza, is not guilty of the crime of the Attempted Murder of Anthony Salas, you may nevertheless find him guilty of the lesser offense of Attempted Voluntary Manslaughter. Attempted Voluntary Manslaughter is defined as follows:

"Every person who unlawfully attempts [without malice aforethought] to kill another human being is guilty of the crime of attempted voluntary manslaughter in violation of sections 664 and 192, subdivision (a) of the Penal Code, a crime.

"Voluntary manslaughter is the unlawful killing of a human being [without malice aforethought].

Defendants contend the trial court erred by giving CALJIC Nos. 5.30 and 5.51 because they set forth “conflicting principles” that prevented the jury from considering Loaiza’s unreasonable self-defense theory. We disagree. CALJIC Nos. 8.41 and 5.17 provided the jury with all of the principles needed to consider unreasonable self-defense

“[There is no malice aforethought if the [or] [attempted killing] occurred [in the actual but unreasonable belief in the necessity to defend [oneself] [or] [another person] against imminent peril to life or great bodily injury].]

“In order to prove this crime, each of the following elements must be proved:

“1. A direct but ineffectual act was done by one person towards killing another human being; [and]

“2. That person had the specific intent to kill the other person[.] [; and]

“[3 The actions taken to kill were unlawful.]

“In deciding whether a direct but ineffectual act was committed, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation, which may consist of planning the killing or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. However, acts of a person who intends to kill another person will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to kill. The acts must be an immediate step in the present execution of the killing, the progress of which would be completed unless interrupted by some circumstances not intended in the original design.

“[An attempt to kill is lawful if done in lawful [self-defense] or defense of others.]”

¹² The court gave the following version of CALJIC No. 5.30: “It is lawful for a person who is being assaulted to defend himself herself from attack if, as a reasonable person, heshe [*sic*] has grounds for believing and does believe that bodily injury is about to be inflicted upon himher [*sic*]. In doing so, that person may use all force and means which heshe [*sic*] believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.”

It gave the following version of CALJIC No. 5.51: “Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in hisher [*sic*] mind, as a reasonable person, an actual belief and fear that heshe [*sic*] is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing himselfherself [*sic*] in like danger, and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual beliefs, the person’s right of self-defense is the same whether the danger is real or merely apparent.”

as a basis for convicting him of attempted voluntary manslaughter. CALJIC Nos. 5.30 and 5.51 did not state conflicting principles, they simply set forth principles applicable to self-defense. They did not preclude the jury from finding Loaiza acted in unreasonable self-defense; rather, they gave Loaiza an additional defense of “perfect” self-defense. Loaiza admitted Salas put his hands in the air and was unarmed and Loaiza did not argue he acted in self-defense. Accordingly, it was highly improbable the jury applied CALJIC Nos. 5.30 and 5.51. In this regard, we note the jury was informed some of the instructions might not apply. (CALJIC No. 17.31.)

8. Adequacy of natural and probable consequences instruction

Reyes contends that the jury instruction on the natural and probable consequences doctrine (CALJIC No. 3.02)¹³ was insufficient for several reasons. First, he complains

¹³ As given by the trial court, CALJIC No. 3.02 provided as follows:

“One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime those crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted.

“In order to find the defendant Reyes guilty of the crimes of 664/187 & 245(a)(2), as charged in Counts 2 & 5, you must be satisfied beyond a reasonable doubt that:

“1. The crime or crimes of 664/187 & 245(a)(2) was were committed;

“2. That the defendant aided and abetted that those crimes;

“3. That a co-principal in that crime committed the crimes of 664/187 & 245(a)(2); and

“4. The crimes of 664/187 & 245(a)(2) was were a natural and probable consequence of the commission of the crimes of murder in ct 1.

“In determining whether a consequence is ‘natural and probable,’ you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A ‘natural’ consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. ‘Probable’ means likely to happen.

“You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an

the trial court failed to inform the jury that an aider and abettor could be convicted of a lesser offense than the direct perpetrator. Although the court instructed the jury on attempted voluntary manslaughter as a lesser included offense of attempted murder, Reyes complains this was not linked to the natural and probable consequences instruction, and CALJIC No. 3.00 instructed the jury that each principal was “equally guilty.”

An aider and abettor may be found guilty of a lesser crime than that ultimately committed by the perpetrator where the evidence suggests the ultimate crime was not a reasonably foreseeable consequence of the criminal act originally aided and abetted, but a lesser crime committed by the perpetrator during the accomplishment of the ultimate crime was such a consequence. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1577, 1586-1587.) Therefore, if the evidence raises a question whether the greater offense is a natural and probable consequence of the target offense, but would support a finding that a lesser included offense was such a consequence, the trial court should instruct sua sponte on the lesser included offense with respect to the aider and abettor. (*Id.* at pp. 1578, 1588, 1593.) However, it need not instruct on an included offense if the evidence establishes the perpetrator’s offense was a reasonably foreseeable consequence of the target offense, and no evidence suggests otherwise. (*Id.*, at pp. 1578, 1593.)

The trial court instructed the jury it could convict Reyes of attempted murder only if it found attempted murder was a natural and probable consequence of the murder of Castro. Accordingly, if the jury found attempted murder was not a reasonably foreseeable consequence, it could not have applied CALJIC No. 3.02 to Reyes. The jury was instructed that its factual findings might make some of the instructions inapplicable. (CALJIC No. 17.31.) Moreover, the jury’s attempted murder verdict against Loaiza establishes that the jury rejected Loaiza’s unreasonable self-defense theory. Accordingly, any error in failing

identified and defined target crime and that the crime of 664/187 & 245(a)(2) was a natural and probable consequence of the commission of that target crime.”

to inform the jury that it could convict Reyes of attempted voluntary manslaughter was harmless beyond a reasonable doubt.

In a related point, Reyes complains the trial court did not instruct on attempted voluntary manslaughter based on heat of passion as a lesser included offense. This contention has no merit because the evidence did not support a heat of passion theory.

Next, Reyes complains the trial court did not tell the jury it must determine whether the mental state or circumstances that made the attempted murder premeditated were foreseeable “from the standpoint of appellant’s accomplice liability.” However, no such instruction was required. (*People v. Cummins* (2005) 127 Cal.App.4th 667, 680-681.)

In any event, the adequacy of instructions is determined by considering the entire charge to the jury. (*People v. Holt* (1997) 15 Cal.4th 619, 677.) Considered as a whole, the remaining instructions effectively informed the jury a willful, deliberate, premeditated murder attempt had to be a natural and probable consequence of the target crime. CALJIC No. 3.02 informed the jury that “In determining whether a consequence is ‘natural and probable,’ you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur.... A ‘natural’ consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. ‘Probable’ means likely to happen.” CALJIC No. 8.67 informed the jury premeditated meant considered beforehand and “To constitute willful, deliberate, and premeditated attempted murder, the would-be slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decides [*sic*] to kill and makes [*sic*] a direct but ineffectual act to kill another human being.”

Under these instructions, to convict Reyes of premeditated attempted murder, the jury had to find (1) a reasonable person would have foreseen it was likely that during the execution of defendants’ plan to murder Castro, Loaiza would try to kill a witness, such

as Salas, and (2) Loaiza decided before he shot at Salas that he would try to kill him. If the jury made those findings, it is not reasonably possible it would have concluded attempted murder was a natural and probable consequence of the plan to murder Castro, but premeditation was not. To reach such a conclusion, the jury would have to find it was *foreseeable* that Loaiza would play his role in the plan by carrying a gun and shooting a witness, but *not foreseeable* he would consider his actions beforehand. These findings cannot be reconciled. Accordingly, the instructions effectively required the jury to find premeditation was a natural and probable consequence of the target crime.

Finally, Reyes contends the trial court failed to clearly designate the target offense as murder. Reyes is either mistaken or he has failed to adequately explain his contention, as the trial court clearly specified the target offense as “the commission of the crimes of murder in c[oun]t 1.”

To the extent Reyes challenges the constitutional validity of the natural and probable consequences doctrine, his contentions have been rejected numerous times. See, e.g., *People v. Richardson* (2008) 43 Cal.4th 959, 1022.

9. Refusal to instruct upon accident and misfortune (count 2)

Loaiza asked the trial court to instruct upon accident and misfortune with respect to the attempted murder of Salas. Defendants contend the trial court erred by refusing to do so.

No crime is committed by a person who commits the act charged through misfortune or by accident, “when it appears that there was no evil design, intention, or culpable negligence.” (§ 26.) An accident defense is based upon a claim defendant acted without the requisite mental state. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390.) The burden is on defendant to establish the absence of evil design, intention and culpable negligence. (*People v. Thurmond* (1985) 175 Cal.App.3d 865, 871.)

There was no evidence Loaiza’s gun fired accidentally. Indeed, Loaiza testified he pulled out his gun, aimed it at Salas’ head, then lowered his aim and pulled the trigger

“about twice.” This demonstrates intentional conduct and negates any theory of accident or misfortune. His claim he did not actually intend his bullets to strike Salas does not demonstrate accident or misfortune, and was necessarily rejected by the jury, as shown by its finding the attempted murder of Salas was willful, deliberate, and premeditated. (*People v. Jones* (1991) 234 Cal.App.3d 1303, 1315.) Accordingly, even if the trial court erred by refusing to instruct on accident and misfortune, the error was harmless beyond a reasonable doubt.

10. Failure to define assault

The trial court instructed on assault with a firearm, but failed to define “assault.”¹⁴ Defendants contend, and the Attorney General concedes, the trial court erred by failing to include in the jury instructions a definition of assault. We conclude the error was harmless.

Even with federal constitutional error such as failing to instruct on an element of the offense, harmless error analysis is appropriate when it is possible to determine the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. (*People v. Kobrin* (1995) 11 Cal.4th 416, 428, fn.8.)

¹⁴ The trial court instructed with CALJIC No. 9.02, providing as follows:

“Defendant is accused in Counts [*sic*] 5 of having violated section 245, subdivision (a)(2) of the Penal Code, a crime.

“Every person who commits an assault upon the person of another with a firearm is guilty of a violation of section 245, subdivision (a)(2) of the Penal Code, a crime.

“ ‘Great bodily injury’ refers to significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or moderate harm.

“A firearm includes a handgun any device designed to be used as a weapon from which a projectile may be expelled by the force of an explosion or other form of combustion.

“In order to prove this crime, each of the following elements must be proved:

“1. A person was assaulted; and

“2. The assault was committed with a firearm.”

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. (Pen. Code, § 240.) The omitted instruction would have informed the jury that an assault required proof that “1. A person willfully [and unlawfully] committed an act which by its nature would probably and directly result in the application of physical force on another person; 2. The person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and 3. At the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another.” (CALJIC No. 9.00) The jury expressly found that in committing the assault with a firearm (count 5), Loaiza personally used a firearm within the meaning of section 12022.5, subdivision (a)(1), i.e., he “intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it.” (CALJIC No. 17.19.) The jury further found Loaiza personally inflicted great bodily injury on Salas in the commission of this assault. The jury necessarily found, beyond a reasonable doubt, Loaiza had the present ability to apply physical force to the person of another, and in fact did so by shooting Salas.

The jury thus found Loaiza committed an assault. (*People v. Simington* (1993) 19 Cal.App.4th 1374, 1381 [omission of definition of assault harmless when jury found the completed crime, a battery, had been committed].) The same principles apply to Reyes as an aider and abettor. Thus, the factual question posed by the omitted instruction on the definition of assault was necessarily resolved against defendants under other instructions.

11. CALJIC No. 2.90

The trial court used CALJIC No. 2.90¹⁵ to instruct the jury on the prosecution's burden of proof. Defendants contend CALJIC No. 2.90 violated due process because the phrase "an abiding conviction" conveyed a standard of proof akin to the clear and convincing evidence standard.

CALJIC No. 2.90 conforms precisely to the instruction suggested in *People v. Freeman* (1994) 8 Cal.4th 450, 504, footnote 9, and correctly defines reasonable doubt. (See, e.g., *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1571-1572.)

12. Sentencing error claims

a. Reyes

1. Count 2

Reyes contends, and the Attorney General concedes, the base term should have been 25 years to life under the Three Strikes Law, not triple the 15 year minimum parole eligibility period under section 186.22, subdivision (b)(5) because Reyes did not personally use a gun in the commission of count 2. (§ 12022.53, subd. (e)(2).) Our reversal of the gang enhancement findings also precludes application of section 186.22, subdivision (b)(5).

Reyes further contends the trial court should not have imposed a 25-years-to-life firearm enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1) because he was not a principal. Although we disagree with Reyes' rationale, the reversal of the gang enhancement findings precludes application of section 12022.53, subdivision (e)(1) to Reyes. Because Reyes did not personally shoot Salas, his sentence on count 2 is not subject to a section 12022.53 enhancement.

¹⁵ CALJIC No. 2.90, as given, defined reasonable doubt as follows: "It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they

The Attorney General appears to argue the trial court should have imposed a five-year prior serious felony enhancement pursuant to section 667, subdivision (a)(1) with respect to count 2. However, only a single prior serious felony conviction was alleged and found true. The court imposed the enhancement required by section 667, subdivision (a)(1) as part of the term for count 1. Accordingly, it could not impose a second enhancement for other counts. We note the court incorrectly imposed a second section 667, subdivision (a)(1) enhancement for count 5.

Accordingly, Reyes' sentence for count 2 must be modified to be 26 years to life. This includes the one-year prior prison term enhancement under section 667.5, subdivision (b).

2. Count 4

Reyes contends the sentence on count 4 (felon in possession) should have been stayed pursuant to section 654. He bases this contention, in part, on a claim the gun he used belonged to Loaiza. Although the record indicated police found a bullet in Loaiza's room that had been cycled through the 9 millimeter semi-automatic gun apparently used by Reyes, there was no evidence Loaiza ever possessed the gun. Reyes' claim is thus speculation, as far as the appellate record reveals.

Section 654 prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If all the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. (*Ibid.*) If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The defendant's intent and objective are factual questions for the trial court, and we will

cannot say they feel an abiding conviction of the truth of the charge.”

uphold its ruling on these matters if it is supported by substantial evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

A conviction for firearm possession by a felon “presents a unique circumstance in the minefield of section 654 cases in that this charge involves an important policy consideration,” i.e., to minimize the danger to public safety arising from free access to firearms, a danger presumed to be greater when the person possessing the concealable firearm is a convicted felon. (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1409.) Whether possession of the gun and an offense in which the gun is used are divisible depends upon the facts of the case. (*People v. Bradford* (1976) 17 Cal.3d 8, 22.) “[M]ultiple punishment is improper where the evidence ‘demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense’” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1144 quoting *Ratcliff, supra*, 223 Cal.App.3d at p. 1412.) However, “section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm.” (*Jones, supra*, 103 Cal.App.4th at p. 1145.)

Unlike Loaiza, who testified he routinely carried his revolver and did so on the day of the charged offenses, there was no direct evidence regarding when Reyes came into possession of the gun he used to kill Castro. However, the circumstantial evidence supports a strong inference Reyes arrived at the scene in possession of the gun. At some point after he got into the car with Castro, he had the gun in his hand and fired it. Whether Reyes had the gun concealed somewhere in the car or on his person, he clearly had actual or constructive possession of it before he fired it at Castro. It is irrelevant whether Reyes owned the gun, borrowed it from someone else, or was given the gun by Loaiza at some point before they went to Salas’ house. The record thus provides substantial evidence supporting the trial court’s conclusion that section 654 was inapplicable.

3. Count 5

Reyes contends, and the Attorney General concedes, the trial court improperly imposed and stayed a third strike term of 25 years to life for count 5 because the Information only alleged strikes with respect to counts 1, 2, and 4. As previously noted, the trial court also improperly enhanced the sentence under section 667, subdivision (a)(1). Moreover, reversal of the gang enhancement findings precludes imposition of a gang enhancement. Accordingly, reversal is required for the limited purpose of resentencing Reyes on count 5.

b. Loaiza

1. Count 1

Reversal of the gang enhancement findings precludes the application of section 12022.53, subdivision (e)(1) to Loaiza. Because Loaiza did not personally shoot Castro, his sentence on count 1 is not subject to a section 12022.53 enhancement. His sentence for count 1 must be modified to be 55 years to life. This includes the five-year enhancement under section 667, subdivision (a).

2. Count 2

Loaiza contends the sentence on count 2 is erroneous. He argues the trial court improperly imposed a minimum term of 15 years, whereas he believes the minimum term should have been seven years under sections 664, subdivision (a) and 3046, subdivision (a). He bases this contention on the theory the jury did not make a finding under section 186.22, subdivision (b)(5), but under subdivision (b)(1)(C).

Although we disagree with Loaiza's rationale, the reversal of the gang enhancement findings precludes application of the minimum parole eligibility provisions of section 186.22, subdivision (b)(5). Accordingly, the minimum term is seven years, as provided in section 3046, subdivision (a).

The Attorney General appears to argue the trial court should have imposed a five-year prior serious felony enhancement pursuant to section 667, subdivision (a)(1) with respect to count 2. However, only a single prior serious felony conviction was alleged

and found. The court imposed the enhancement required by section 667, subdivision (a)(1) as part of the term for count 1. Accordingly, it could not impose a second enhancement for other counts.

Loaiza's term for count 2 should therefore be 39 years to life, consisting of a second strike term of 14 years to life, plus a 25-years-to-life enhancement under section 12022.53, subdivision (d).

3. Count 3

The Attorney General also appears to argue the trial court miscalculated the term on count 3 by failing to apply the prior prison term enhancement, which the Attorney General argues should have been doubled under the Three Strikes Law. The Attorney General is wrong. The trial court struck the prior prison term enhancement, and terms for enhancements are not doubled under the Three Strikes Law. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 424.)

4. Count 5

We further note the trial court imposed a second strike term on Loaiza on count 5, despite the failure of the Information to plead a strike with respect to that count. In addition, the gang enhancement must be stricken. Accordingly, Loaiza must also be resentenced with respect to count 5.

13. Ineffective assistance of counsel

A claim counsel was ineffective requires a showing, by a preponderance of the evidence, of objectively unreasonable performance by counsel and a reasonable probability that, but for counsel's errors, defendant would have obtained a more favorable result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Defendants contend their trial attorneys rendered ineffective assistance by failing to assert any contentions this court deems forfeited. Although we concluded many of their contentions were forfeited, we nonetheless addressed the merits of the contentions

and found none of them viable. Accordingly, defendants are unable to demonstrate prejudice.

14. Cumulative error

Defendants also contend the cumulative effect of various claimed errors requires reversal. The errors we found were few and, apart from the insufficiency of the evidence supporting the gang enhancement findings, they were harmless. We conclude the errors, considered together, did not undermine the evidence establishing defendants' guilt, and there is no reasonable probability defendants would have achieved a more favorable result absent these errors.

DISPOSITION

The true findings on the gang enhancement allegations are reversed with respect to each defendant and counts 1, 2, and 5. The trial court is directed to dismiss the allegations. In all other respects, the defendants' convictions are affirmed. Their sentences are vacated and the cause is remanded to resentence each defendant on count 5. The trial court should also modify Reyes' sentence on count 2 by imposing a Third Strike term of 25 years to life, enhanced by 1 year (§ 667.5, subd. (b)), for a total of 26 years to life. The court should also make the following modifications to Loaiza's sentence: for count 1, the court should impose a second strike term of 50 years to life, enhanced by 5 years (§ 667, subd. (a)(1)), for a total of 55 years to life; for count 2, the court should

impose a second strike term of 14 years to life, enhanced by 25 years to life (§ 12022.53, subd. (d)), for a total of 49 years to life.

NOT TO BE PUBLISHED

DUNNING, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.